

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COALITION TO DEFEND AFFIRMATIVE) Case No. 10-641 SC
ACTION, INTEGRATION AND IMMIGRANT)
RIGHTS AND FIGHT FOR EQUITY BY ANY) ORDER GRANTING
MEANS NECESSARY, et al.,) MOTION TO DISMISS

Plaintiffs,

v.

ARNOLD SCHWARZENNEGER, in his
official capacity as Governor of
the State of California, and MARK
YUDOF, in his official capacity as
President of the University of
California,

Defendants,

WARD CONNERLY, and AMERICAN CIVIL
RIGHTS FOUNDATION,

Defendant-Intervenors.

I. INTRODUCTION

This action was initiated by Plaintiffs Coalition to Defend Affirmative Action ("CDAA"), Integration and Immigrant Rights and Fight for Equality by Any Means Necessary ("BAMN"), and fifty-six individually named California high-school and college students (collectively, "Plaintiffs"). ECF No. 1 ("Compl."). Plaintiffs challenge the constitutionality of Section 31 of Article I of California's constitution ("Section 31"), which bans race-based

1 discrimination and preferential treatment by the state. Id.
2 Specifically, Plaintiffs argue that Section 31, as applied by the
3 University of California in formulating its student admission
4 policies, violates the Fourteenth Amendment's Equal Protection
5 Clause. Id. Now before the Court is a Motion by Defendant-
6 Intervenor Ward Connerly ("Connerly") and the American Civil
7 Rights Foundation ("ACRF") (collectively, "Intervenor") to dismiss
8 this action with prejudice. ECF No. 49 ("Mot."). Plaintiffs
9 filed an Opposition, ECF No. 50 ("Opp'n"), and Intervenor filed a
10 Reply, ECF No. 51 ("Reply"). For the following reasons, the Court
11 GRANTS Intervenor's Motion.

12 13 **II. BACKGROUND**

14 The following facts are taken primarily from Plaintiffs'
15 Complaint; for the purposes of this Motion under Rule 12(b)(6) of
16 the Federal Rules of Civil Procedure, the Court assumes them to be
17 true. The University of California ("UC") is a public university
18 system chartered in 1868 by the state of California. Compl. ¶ 110.
19 The UC's fundamental governing structure is provided by
20 California's constitution, which establishes the UC Regents as its
21 governing body. Cal. Const. art. IX, § 9(a). California's
22 constitution provides the UC Regents with "full powers of
23 organization and government, subject only to such legislative
24 control as may be necessary to ensure the security of its funds and
25 compliance with the terms of the endowments of the university . . .
26 ." Cal. Const. art. IX, § 9(a). The UC Regents' power extends to
27 determining student admission policies for the UC's ten university
28 campuses. Compl. ¶ 112.

1 In the 1970s, the UC Regents implemented student admission
 2 policies to increase the number of enrolled underrepresented
 3 minority students. Id. ¶ 125. These policies considered the race
 4 of the student as an admission factor. Id. While these policies
 5 boosted the number of enrolled minority students, they were
 6 unpopular with many California citizens, and in 1995, newly
 7 appointed UC Regent Connerly launched a campaign against so-called
 8 "affirmative-action" admission policies in California.¹ Id. ¶ 131.
 9 That year, the UC Regents adopted a policy that "banned any
 10 constituent part of the University from considering race in
 11 admitting students for any purpose, including attempts to ensure
 12 that the entering classes were racially diverse and integrated."
 13 Id. ¶ 136.

14 Connerly then led a drive to amend California's constitution
 15 through voter initiative to prohibit the state from engaging in
 16 affirmative-action programs. Id. ¶ 138. In November 1996,
 17 Proposition 209 -- the Connerly-supported voter initiative -- was
 18 approved by California's voters and written into the California
 19 constitution as Section 31 of Article I.² Id. ¶ 140.

20 Section 31 now provides:

21 (a) The state shall not discriminate against,
 22 or grant preferential treatment to, any
 23 individual or group on the basis of race, sex,
 24 color, ethnicity, or national origin in the
 operation of public employment, public
 education, or public contracting.

25 ¹ The Court adopts the definition of "affirmative action" used by
 26 the Ninth Circuit in an earlier challenge to Section 31: "state
 programs that use race or gender classifications." Coal. for Econ.
 Equity v. Wilson, 122 F.3d 692, 700 n.7 (9th Cir. 1997).

27 ² While this Court refers to the proposition and subsequent
 28 constitutional amendment exclusively as "Section 31," papers
 submitted by the parties and previous court rulings use "Section
 31" and "Proposition 209" interchangeably.

. . . .

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

Cal. Const. art. I, § 31.

The UC Regents have not considered race as a factor in student admissions decisions since 1995. Compl. ¶¶ 141-44. Consequently, while black, Latino, and Native American students comprise more than thirty percent of the newly admitted students at UC's Riverside and Merced campuses, the number of minority students enrolled at the most selective campuses in Berkeley ("UC Berkeley") and Los Angeles ("UCLA") has decreased significantly. Id. ¶ 142.

Section 31 was immediately challenged in federal court. Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) ("Wilson"). The district court found that Section 31 violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and ordered a preliminary injunction barring the state from enforcing it; a Ninth Circuit panel reversed. Id. The panel held that the Wilson plaintiffs had "no likelihood of success on the merits" of their claims, holding that Section 31 was constitutional under the Equal Protection Clause's "conventional" and "political structure" analyses, and holding that Section 31 was not preempted by Title VII of the Civil Rights Act of 1964. Id. at 701-11. The Ninth Circuit denied a petition for an en banc hearing. Id. Section 31 has also withstood several equal protection challenges to its application in government contracting.

1 E.g., Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068
2 (Cal. 2000), Coral Const., Inc. v. City and County of San
3 Francisco, 235 P.3d 947 (Cal. 2010).

4 Now, Plaintiffs bring the current action, claiming that
5 Section 31, as applied by the UC Regents in formulating student
6 admission policies, violates the Equal Protection Clause. Compl.
7 ¶¶ 195-215. Plaintiffs argue that the current factors the UC
8 considers in its student admission policies -- standardized test
9 scores and a weighted grade point average that favors students who
10 have taken honors or advanced placement classes -- reflect "the
11 separate and distinctly unequal elementary and secondary education"
12 provided to California's minority students. Id. ¶¶ 20-22.
13 Plaintiffs argue that because the UC cannot directly consider race
14 as an admission factor, it cannot effectively counteract the
15 allegedly prejudicial effects of these other factors. Id. ¶ 201.
16 Plaintiffs seek both a preliminary and permanent injunction
17 restraining the enforcement of Section 31 "as it applies to the
18 admission, education and graduation of students at the University
19 of California." Id. ¶ 204.

20 After the Court granted Intervenor's motion to intervene as
21 Defendants, see ECF No. 42, Intervenor's filed the present Motion.
22 Intervenor's argue that the Ninth Circuit's opinion in Wilson
23 precludes Plaintiffs' constitutional challenge to Section 31. Mot.
24 at 1-7. In response, Plaintiffs argue that Wilson was wrongly
25 decided, that Wilson's logic is inconsistent with later Supreme
26 Court opinions, and that Wilson is not controlling because it was a
27 facial, rather than as-applied, constitutional challenge to Section
28 31. See Opp'n.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to . . . nudge[] their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570. While the court should generally give plaintiff leave to amend a deficient complaint, it may dismiss an action with prejudice if the complaint is predicated on a misrepresentation of law such that amendment would be futile. Eminence Capital LCC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

IV. DISCUSSION

Plaintiffs' Complaint asserts two causes of action: "Count One" is "Racial Discrimination in the Structure of Government," and

"Count Two" is "Racial Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment." See Compl. Plaintiffs clarify in their Opposition that these two causes of action are both equal protection challenges to Section 31. See Opp'n at 11-20. The second is a challenge under the "conventional" equal protection analysis, which applies to government-sponsored racial preferences; the first is a challenge under the "political structure" equal protection analysis, which recognizes "a right to fairness in the political process, as opposed to entitlement to a particular outcome." Coal. to Defend Affirmative Action, Integration and Immigration Rights v. Regents of the Univ. of Michigan, 592 F. Supp. 2d 948, 950 (E.D. Mich. 2008) (emphasis in original).

A. Plaintiffs' Conventional Equal Protection Challenge

The Equal Protection Clause of the Fourteenth provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the conventional equal protection analysis, a reviewing court must analyze all racial classifications imposed by state action under "strict scrutiny." Grutter v. Bollinger, 539 U.S. 306, 326 (2003). The first step is identifying the racial classification that the state draws; the second is identifying whether this classification is justified by a compelling state interest; the third is to determine if the classification is narrowly tailored to further that interest. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 285 (1986)

The Ninth Circuit panel applied this standard in Wilson. 122 F.3d at 702. The panel held that the challenge to Section 31

1 failed the first step, holding that Section 31 does not make racial
2 classifications, but rather prohibits them. Id. The court wrote:
3 "A law that prohibits the State from classifying individuals by
4 race or gender a fortiori does not classify individuals by race or
5 gender." Id.

6 Intervenor's argue that this Court's analysis should stop here:
7 because Wilson has ruled that Section 31 does not make a
8 classification on the basis of race, and because this Court is
9 bound by the precedent set by the Ninth Circuit, any conventional
10 equal protection challenge to Section 31 must fail. Mot. at 1-2.

11 Plaintiffs argue that because Wilson was a facial challenge to
12 Section 31, it should not preclude Plaintiffs' as-applied
13 challenge. Opp'n at 14. Plaintiffs argue that Wilson was premised
14 on the idea that affirmative action constituted "preferential
15 treatment," and argue that "affirmative action in higher education
16 authorizes not 'preferences,' but measures to overcome preferences
17 that favor white and Asian American students." Id. at 4.

18 Plaintiffs argue, essentially, that the other factors the UC
19 considers -- such as standardized testing scores and grade-point
20 averages -- discriminate against black, Latino, and Native American
21 students, and thus affirmative action is necessary to counteract
22 their discriminating effects. See Opp'n at 5-9, 20-22.

23 Plaintiffs essentially argue that Wilson involved a broad
24 facial challenge to Section 31, and the specific scenario
25 Plaintiffs allege above -- a need to use race as an admission
26 factor to counteract other forms of discrimination -- was not
27 before the court. The record, however, proves otherwise. As the
28 lower court in Wilson clearly stated:

1 It is thus essential to keep in mind that
2 plaintiffs' constitutional challenge to
3 Proposition 209 is not, in fact, a facial
4 challenge to the entire initiative. Rather, it
5 is much narrower in scope: it is a challenge
6 only to that slice of the initiative that now
prohibits governmental entities at every level
from taking voluntary action to remediate past
and present discrimination through the use of
constitutionally permissible race- and gender-
conscious affirmative action programs.

7 946 F. Supp. 1480, 1488 (N.D. Cal. 1996) (emphasis added).

8 As such, the Ninth Circuit considered the very scenario
9 Plaintiffs now allege. The court found that in barring the use of
10 constitutionally permissible racial preferences to remediate past
11 and present discrimination, Section 31 did not violate the Equal
12 Protection Clause. Id. As such, Wilson's facial challenge to
13 Section 31 covers the specific application of Section 31 Plaintiffs
14 allege is unconstitutional.

15 Additionally, Plaintiffs devote a great deal of space in their
16 Opposition to criticizing the logic of Wilson. They make these
17 arguments to the wrong court, as this Court is bound by stare
18 decisis. "A district judge may not respectfully (or
19 disrespectfully) disagree with his learned colleagues on his own
20 court of appeals who have ruled on a controlling legal issue, or
21 with Supreme Court Justices writing for a majority of the Court."
22 Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001).

23 Because the Ninth Circuit has already determined that a
24 conventional equal protection challenge to Section 31, as it
25 applies to all state-sponsored affirmative action programs, must
26 fail, the Court finds that Plaintiffs' traditional equal protection
27 challenge fails. Furthermore, the Court finds Plaintiffs'
28 challenge to Section 31 is so clearly precluded by Wilson as to

render amendment of the claim to be futile. Eminence Capital, 316 F.3d at 1052. For these reasons, the Court DISMISSES WITH PREJUDICE Count Two of Plaintiffs' Complaint.

B. Political Structure Equal Protection Analysis

The political structure doctrine of equal protection was developed by the Supreme Court in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) ("Seattle"). Under this analysis, the Equal Protection Clause reaches "a political structure that treats all individuals as equals . . . yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." Seattle, 458 U.S. at 467.

The Ninth Circuit found in Wilson that Section 31 did not violate the Equal Protection Clause under this political structure analysis. 122 F.3d. at 705-07. The Court found that this doctrine was not applicable to Section 31 because it was not a state action that discriminated on the basis of race. Id. The court also noted that the burden placed by Section 31 was not "an impediment to protection against unequal treatment" but "an impediment to preferential treatment," holding: "Impediments to preferential treatment do not deny equal protection." Id. at 708. Intervenor's argue that, in light of Wilson, Plaintiffs' political structure argument should fail as a matter of law.

Plaintiffs' main argument in response is that Wilson's logic is inconsistent with Grutter v. Bollinger, 539 U.S. 306 (2003). Opp'n at 16. Grutter does not discuss the political structure doctrine. Rather, it involved a conventional equal protection

1 challenge to the University of Michigan's School of Law's practice
2 of considering race as one factor in student admission. Id. at
3 311-16. The Supreme Court upheld the practice, finding that the
4 state had a compelling interest in attaining a diverse student body
5 and that the school's admissions policies were narrowly tailored to
6 serve this interest. Id. at 342-44.

7 The Court is not convinced that Grutter overrules Wilson.
8 Grutter does not hold that the Constitution requires the use of
9 race in student admission decision; rather, it holds that the
10 Constitution tolerates the use of race as one of many admission
11 factors. Id. As such, Grutter says nothing to refute Supreme
12 Court precedent, cited in Wilson, that "the Equal Protection Clause
13 is not violated by the mere repeal of race-related legislation or
14 policies that were not required by the Federal Constitution in the
15 first place." Crawford v. Bd. of Educ. of the City of Los Angeles,
16 458 U.S. 527, 538 (1982). Because use of race as a factor in
17 student admission decisions is permitted but not required by the
18 Equal Protection Clause, Wilson is not inconsistent with Grutter.

19 Furthermore, as Intervenors point out, Grutter even indirectly
20 refers to Section 31. 539 U.S. at 342. Grutter held that racial
21 preferences, while not presumptively unconstitutional, must be
22 limited in time. Id. In so holding, the Supreme Court cited the
23 "race-neutral alternatives" to racial preferences used by
24 "Universities in California, Florida, and Washington State, where
25 racial preferences are prohibited by state law." Id. The Court
26 suggested that California and other states were "laboratories"
27 experimenting with alternatives to racial preferences, writing:
28 "Universities in other States can and should draw on the most

1 promising aspects of these race-neutral alternatives as they
2 develop." Id. This discussion refutes Plaintiffs' contention that
3 the Supreme Court intended Grutter to overrule Wilson.

4 Plaintiffs make other arguments that Wilson has been
5 superseded. Plaintiffs state that "the substantive standards of
6 Proposition 209 are, as applied in the area of higher education, in
7 violation of the Fourteenth Amendment because their sole aim and
8 effect is to exclude minority students," and argue that Wilson
9 ignored this "for reasons that have been superseded by later
10 decisions by the state and federal courts." Opp'n at 4-5.

11 Plaintiffs do not clarify which later decisions supersede Wilson
12 with respect to this issue. However, it has been the law since
13 Crawford that "a law neutral on its face still may be
14 unconstitutional if motivated by a discriminatory purpose." 458
15 U.S. at 544. Crawford predates Wilson by fifteen years, and was
16 discussed at length by the court in Wilson. 122 F.3d at 705-09.
17 Thus if Wilson failed to analyze the motivation behind the adoption
18 of Section 31, this inconsistency would have been apparent in 1997,
19 and was not created by later Supreme Court case law.

20 Finally, Plaintiffs attempt to identify other inconsistencies
21 between Wilson and subsequent Supreme Court cases. Plaintiffs take
22 issue with the following statement in Wilson: "The alleged 'equal
23 protection' burden that Proposition 209 imposes on those who would
24 seek race and gender preferences is a burden that the Constitution
25 itself imposes." Id. at 708. Plaintiffs write: "The Wilson
26 panel's claim that a law banning all 'preferences' was simply a
27 restatement of the Fourteenth Amendment was never true." Opp'n at
28 22. Plaintiffs claim: "Grutter and subsequent decisions have made

1 clear that the theory that the Constitution bars all consideration
2 of race is 'inconsistent in both its approach and its implications
3 with the history, meaning and reach of the Equal Protection
4 Clause.'" Id. (citing Parents Involved in Cmty. Schs. v. Seattle
5 Sch. Dist. No. 1, 551 U.S. 701 (2007)).

6 Plaintiffs do not explain, however, how these alleged
7 inconsistencies destroy the fundamental logic of Wilson.
8 Plaintiffs cite to no political structure cases decided after
9 Wilson. Rather, they try to wrench inconsistencies out of Wilson's
10 dicta. Such inconsistencies do not so poison Wilson's logic as to
11 free this Court from its duty to apply the precedent set by its
12 reviewing court.

13 For these reasons, the Court finds that Plaintiffs' political
14 structure equal protection challenge to Section 31 fails as a
15 matter of law. Because amendment would be futile, the Court
16 DISMISSES WITH PREJUDICE Count One of Plaintiffs' Complaint.

17
18 **V. CONCLUSION**

19 For the foregoing reasons, the Court GRANTS the Motion to
20 Dismiss by Defendant-Intervenors Ward Connerly and the American
21 Civil Rights Foundation. This Complaint filed by Plaintiffs
22 Coalition to Defend Affirmative Action, et al. is DISMISSED WITH
23 PREJUDICE.

24
25 IT IS SO ORDERED.

26
27 Dated: December 8, 2010

28 
UNITED STATES DISTRICT JUDGE